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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~539~~ 13

EDWARD J. MEYER, MARION E. MEYER and ALFRED M. SAPERSTON, Executors of the Estate of Albert F. Meyer,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edward J. Meyer, Marion E. Meyer and Alfred M. Saperston, Executors of the Estate of Albert F. Meyer, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 4, 1959, reversing the judgment of the United States District Court for the Western District of New York in the amount of $2,339.72 with interest from September 9, 1954, in favor of the Executors against the United States of America.

Opinions Below

The prevailing and dissenting opinions of the Court below (App. A *infra*) are not yet reported. The opinion of the United States District Court for the Western District of New York is reported in Volume 166 of the Federal Supplement at page 629.

Jurisdiction

This petition involves federal estate taxes. The judgment of the Court below was entered on September 4, 1959. Jurisdiction is conferred on this Court by 28 U. S. C Section 1254 (1), and by Rule 19-1(b) of the Supreme Court Rules due to a conflict in decisions of the Circuit Court of Appeals of the Second and Third Circuits on the same matter.

Question Presented

Whether the Circuit of Appeals erred in holding that the Estate of Albert F. Meyer is not entitled to a marital deduction under Sec. 812 (e) (1) (A) of the Internal Revenue Code of 1939 with respect to a certain portion of the proceeds of two life insurance policies on the life of the decedent which proceeds were payable under the options elected by the decedent in monthly payments to the surviving spouse for life, but if she should die within the first 20 years, the payments were to be made for the remainder of the 20-year period to decedent's daughter then surviving but not otherwise.

Statutes Involved

The pertinent provisions of the Internal Revenue Code of 1939 as amended by the Revenue Act of 1948 appear in Appendix B *infra*.

Statement

The facts as generally stipulated were adopted by the Circuit Court of Appeals and may be summarized as follows:

Petitioners are Executors of the Estate of Albert F. Meyer, who died September 14, 1952, having received letters testamentary as such Executors from the Surrogate's Court of Erie County, New York, on October 9, 1952, and presently are acting as such Executors (Finding 1).

Included in Schedule M of the estate tax return, as part of the property passing to the surviving spouse, were the proceeds of two insurance policies totaling $30,207.10. This amount included the proceeds from an insurance policy on decedent's life issued by Northwestern Mutual Life Insurance Company, Policy No. 3212835 (originally identified as Policy No. 3056279), payable to Marion E. Meyer, wife of decedent, in the amount of $25,187.50, and the proceeds of an insurance policy on ~~decedent's life~~ issued by John Hancock Mutual Life Insurance Company, Policy No. 2035894, payable to Marion E. Meyer in the amount of $5,019.60. Proceeds of these policies were included in the gross estate as items 3 and 8, respectively, of Schedule D of the estate tax return (Finding 4).

The decedent filed a Nomination of Beneficiary and Election of Settlement Option dated December 4, 1940, for each of the above mentioned policies. The settlement option for the John Hancock policy, hereinafter referred to as Option 3 provided for the payment of the proceeds of the policy in 20 annual installments in equivalent monthly payments to decedent's wife, Marion E. Meyer, if living, and thereafter during her lifetime, but, if the dece-

dent's wife was not living at his death, the installments were to be paid to the decedent's daughter, Shirley A. Meyer, in the same manner. In the event of the death of the wife after becoming entitled to payment and before payment in full of the 20 annual installments, any of the 20 installments or monthly portions thereof then remaining unpaid, were to be paid, as they became payable, to the daughter. In the event of the death of the last survivor of the insured, his wife and his daughter, before payment in full, the amount payable or the commuted amount of any of the 20 installments or monthly portions thereof then remaining unpaid, were to be paid in one sum to the executors or administrators of such last survivor. The settlement option for the Northwestern policy, hereinafter referred to as Option C, provided for the payment of the proceeds of the policy in 240 stipulated monthly installments to Marion E. Meyer, wife of the insured, to be continued, in case of her survival, during her lifetime. However, in the event of the death of Marion E. Meyer while receiving settlement under Option C, the insured's daughter, Shirley A. Meyer, was to receive payment under such option in accordance with its terms as to the stipulated installments remaining unpaid, if any. Each option was in effect at decedent's death (Finding 5; Stipulation).

In the event of Marion E. Meyer's death after having received 20 annual installments from the John Hancock policy and 240 monthly installments from the Northwestern policy, no further payments under said policies would be made.

Decedent was survived by his wife, Marion E. Meyer, and his daughter, Shirley A. Meyer. At the time of Albert Meyer's death, the age of Marion E. Meyer, his surviving wife, to her nearest birthday was 42 (Finding 6).

On the basis of the calculations used by the Northwestern Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $25,187.50, the sum of $17,956.41 was necessary to provide the monthly income for the 240 monthly installments and of the total proceeds $7,231.09 was required to provide a monthly income thereafter for the life of the surviving spouse (Finding 7).

On the basis of the calculations used by the John Hancock Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $5,019.60, the sum of $4,012.24 was necessary to provide monthly income for 20 years certain, and $1,007.36 was required to provide the monthly income thereafter for the life of the surviving spouse (Finding 8).

The Northwestern and John Hancock policies provide that benefits accruing under the settlement option and policy of insurance shall not be transferable, nor subject to commutation or encumbrances, nor to legal process, except in an action to recover for necessaries (Finding 9).

Neither of the above referred to policies provides and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for the funding of the contingent life annuity. Both of the policies provide that the policy and the application therefor constitute the entire contract between the parties (Finding 10).

There is no dispute that the $17,956.41 computed as the amount required under the policy of insurance issued by the Northwestern Mutual Life Insurance Company to provide monthly payments during the 20 years certain period and the $4,012.24 computed as the amount required under the

policy of insurance issued by the John Hancock Mutual Life Insurance Company to provide monthly payments during the 20 years certain period are nondeductible "terminable interests" within the meaning of Section 812 (e) (1) (B) of the Internal Revenue Code of 1939, and no claim is made for allowance of the marital deduction with respect to such amounts (Finding 11).

A claim for refund of estate taxes in the amount of $2,339.72 alleged by the Executors to have been overpaid, was filed by the Executors in the office of the District Director of Internal Revenue at Buffalo, New York, on April 26, 1957. This claim was based upon the contention that the amount of $8,238.45, consisting of portions of the proceeds of each of the two life insurance policies referred to above and taken out by the decedent on his own life and computed by the insurance companies for the funding of the contingent life annuities to be paid to Marion E. Meyer, is in a category which qualifies for the marital deduction (Finding 12).

The District Director disallowed the Executors' claim for refund (Finding 13). The District Court granted judgment for the Executors. The Circuit Court of Appeals reversed the District Court and granted judgment for the United States of America. Jurisdiction was conferred on the Circuit Court of Appeals by 28 U. S. C., Section 1291. Jurisdiction was conferred on the United States District Court by 28 U. S. C. Section 1346.

ARGUMENT

It is the claim of the petitioner that there is only one question to be decided and that question is whether or not the result arrived at by the Circuit Court of Appeals of

the Third Circuit in *In Re Reilley's Estate*, 239 Fed. 2nd 797, is or is not correct. The facts of that case are, for all necessary purposes, on all fours with this case and there apparently is no contrary authority on the question. The Reilley case, except as to the amounts involved and the length of the certain term (which are of no legal consequence in determining the issue) is identical to this case and in the Reilley case, the Court of Appeals, in reversing the Tax Court, held that the amounts allocated by the insurance companies to the funding of contingent life annuities qualify for the marital deduction for Federal Estate tax purposes.

The sole question is whether or not upon the death of the insured there came into being what amounted to two separate properties, all contained in one fund, one covering the rights of the surviving spouse and the daughter during the term certain period and one covering the rights of the surviving spouse during the potential lifetime of the surviving spouse after the expiration of the term certain period. Petitioners contend, according with the opinion of the Court of Appeals in the Reilley case, and with the opinion of the District Court in this case, that there were always two potential parts to the policy, though not specifically set out in the policies, and that these came into separate being upon the death of the insured. Admittedly, the daughter has no interest whatsoever and never could have an interest in the payments to be made to the surviving spouse, after the expiration of the term certain, if she lives past that period. Admittedly, the daughter has a contingent interest in the payments to be made during the term certain because if the surviving spouse dies during that term, payments will continue to the daughter. For that reason, the portion of the proceeds of the policies funded

by the companies to take care of the term certain payments is subject to the terminable interest rule and not properly part of a marital deduction.

Assuming for argument sake that the policies had been written in so many words, to the effect that

(a) a certain portion of the proceeds (dependent upon the age of the surviving spouse at the time of death of the insured), was to be set up for the benefit of the surviving spouse for a certain term of years with a contingent right in the daughter to receive part of the same in the event of the spouse's death before the end of the term, and

(b) that a certain portion of the proceeds (dependent upon the age of the surviving spouse at the time of death of the insured) was to be set up for the sole benefit of the surviving spouse for the rest of her lifetime after the expiration of the term certain. If that had been the case, the government would not be arguing against the marital deduction for the payments referred to in (b) above. Yet, even though the policies did not specifically and in so many words segregate the proceeds nevertheless the practical effect of the policies was to do exactly that and the insurance companies, in their own records, did exactly that.

Petitioners' position is consistent with the intent of Congress in enacting the marital deduction statute, *i. e.*, to provide a tax advantage for a decedent's estate to the extent of the property interest passing to a surviving spouse which cannot be enjoyed by anyone else. That was the fundamental purpose of the marital deduction statute and it seems that that purpose is completely thwarted by the present judgment of the Court of Appeals for the Second

Circuit. The effect of that judgment, if carried to its logical extreme, would mean that if the policies had been for a term certain of only one year and if, of course, a very small percentage of the total proceeds was required to fund the term certain payments for that year, that nevertheless almost the entire proceeds of the policies, namely, the amounts required to fund the contingent payments, could not be allowed for the marital deduction. In other words, even though the surviving spouse, and she alone would be the only one who could possibly obtain any payments from the bulk of the proceeds of the policies, the tax benefit intended for a surviving spouse would not be allowed, because the daughter might under some circumstances share in the proceeds of a very minor portion of the policies. Such an inequitable result was never intended by Congress in enacting the marital deduction statute.

Petitioners do not desire to burden the Court with too extensive quoting from *In Reilley, supra*, but nevertheless feel that it would be helpful to quote certain salient portions of the decision in that case. The Court of Appeals for the Third Circuit, in its decision, stated in part as follows:

> "The purpose of the marital deduction in determining estate tax liability under the Revenue Act of 1948 is to make more nearly uniform the tax treatment of married persons in community property and non-community property states. This was accomplished by allowing a deduction up to fifty per cent of the gross estate of the spouse first to die for outright transfers of assets to the surviving spouse. The assets so removed from the tax in the estate of the spouse first to die are to be exposed to the tax at the death of the surviving spouse. Fundamentally postponement of the tax is contemplated so that if the full marital deduction is taken, the property of the marital community will be subject to the tax only once in the estate of either spouse.

"In order to prevent abuse and tax avoidance through the marital deduction, the terminable interest rule was enacted. Broadly, it excepts from the marital deduction any asset of the estate transferred to the spouse which may by any event ultimately pass from the decedent to any other person for less than full consideration in money or money's worth. But not all terminable interests are barred from the marital deduction. To be excluded, *the property, of which the terminable interest is a part, must under some contingency be liable to pass from the decedent to someone other than the spouse and be possessed and enjoyed by such other person after the surviving spouse* * * *. It is pointed out that a terminable interest may be the entire 'property' and further that a terminable interest may be subdivided into interests, each of which is a separate property for purposes of the terminable interest rule. The limitation on such subdivision is that *under no circumstances may any other person succeed to the property in which the surviving spouse had an interest* * * * Rather it appears that the question of where one 'property' ends, and a separate 'property' begins must be judged in the light of the particular circumstances and their relationship to the purpose of the statute.

"It is those standards which the Tax Court failed to consider in evaluating the word 'property', as applied to the specific facts of the situation before us. *The proceeds of one insurance policy certainly can be divided into separate properties* * * *

"*The simple inquiry here is to ascertain whether a division of the proceeds into two separate properties was accomplished.* So long as the insured was alive the two potential interests were part of the one plan, each depending upon the other and the survival of the insured for their amounts, their beneficiaries and whether they would ever exist. With the happening of the condition, the death of the insured, those two bundles of rights came into being entirely separate and independent. Their respective amounts had to be computed out of the total proceeds by the insurer's formula but that relationship was mechanical rather than causal. The computation was purely actuarial, depending only on the age of the surviving spouse which was fixed for

computation purposes on the happening of the said condition. The death of the decedent was the moment of the transfer; other than the formalities of filing the certificate of death, and making the necessary calculation, the division of the two interests was complete and the rights of the parties then fixed.

"Thereafter the amount of the ten-year certain payments could not be affected by the annuity for life; and the life annuity did not flow from nor could it be affected by the payments certain. The rights under one were not tied in any way to the rights under the other. A person other than the spouse could succeed to one; no one but the spouse could be paid any part of the other * * *

"Under the option selected the insurer must and in fact did separate the proceeds into two separate funds upon the death of the decedent * * *

"There is nothing in Section 812(e) evincing intent that this contingent future life annuity to the surviving spouse alone be taxed in the estate of the spouse first to die. Nor is such purpose indicated in the legislative history. That sort of levy in most instances would impose a heavy burden upon the living spouse for what is at most an expectancy. It would defeat the expressed purpose of the marital deduction. Allowance of the deduction on the contingent annuity before us is well within the deduction's remedial objective, *i.e.*, to eliminate the tax on transfers between husband and wife. Ultimate tax avoidance does not taint the problem. The annuity, if ever received by the widow will be subject to tax in her estate. Whatever benefit may be received by the widow through postponement of tax liability until ultimate transfer outside the marital community is the exact grace granted taxpayers by the Congress in the marital deduction". (Emphasis added.)

The Court of Appeals for the Second Circuit in the majority opinion relies upon certain examples set out in the Senate Committee Report S. Rep. 1013 (part 2) 80th Congress, 2d Sess. (1948) as the authority for its holding. However a careful reading of the examples quoted in the opinion clearly reveals that they are only applicable in the

event that there is a holding that the proceeds of the policies cannot be divided into two properties, which after all is the real question to be decided. The quoted examples do not determine the issue, they merely beg the question and it appears that nothing in the Senate Committee Report or in the statute itself specifically answers the question. Certainly, the majority opinion of the Circuit Court completely disregards the true purpose of the marital deductions statute by straining to read a certain meaning into the Senate Committee Report which is not there. Judge Waterman, in his dissenting opinion in this case, has stated a principle of statutory construction by stating that "in expounding a statute we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law and to its object and policy." Perhaps, inadvertently, but nevertheless actually, the Congress and the Committee neglected to consider the exact type of situation that is involved in this case. This situation is present in thousands of existing life insurance policies. Two Circuit Courts of Appeals have rendered diametrically opposite decisions on the subject. We believe that this difference of opinion should be finally determined and that the Court below erred in its decision.

CONCLUSION

For the reasons stated it is respectfully sumitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 302—October Term, 1958.
(Argued June 2, 1959 Decided September 4, 1959.)
Docket No. 25501

EDWARD J. MEYER, MARION E. MEYER and ALFRED M. SAPERSTON, Executors of the Estate of ALBERT F. MEYER,

Appellees,

v.

UNITED STATES OF AMERICA,

Appellant.

Before: Clark, *Chief Judge,* Lumbard and Waterman, *Circuit Judges.*

Appeal by the United States from a final judgment of the District Court for the Western District of New York, Justin C. Morgan, J., 166 F. Supp. 629, awarding appellees $2,339.72 on their claim of overpayment of estate taxes on the ground that an estate is entitled to an estate tax marital deduction, § 812(e)(1)(A), Internal Revenue Code of 1939, for that portion of the total proceeds of life insurance on the life of decedent which would be required to fund a contingent life annuity for the surviving spouse from and after twenty years, when the whole proceeds are held by the insurer under a settlement option of the policy the terms of which provide that the surviving spouse

shall receive monthly payments for the remainder of her life, but that if she should die before the expiration of twenty years then the decedent's daughter shall receive the payments until twenty years have elapsed. Reversed.

JOHN J. PAJAK, Department of Justice, Washington, D. C. (Charles K. Rice, Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Department of Justice, Washington, D. C., John O. Henderson, United States Attorney and William I. Schapiro, Assistant United States Attorney, Western District of New York, Buffalo, N. Y., on the brief), *for Appellant.*

RICHARD H. WILE, Buffalo, N. Y. (Saperston, McNaughtan & Saperston, on the brief), *for Appellees.*

LUMBARD, *Circuit Judge:*

This appeal by the United States from a final judgment of the District Court for the Western District of New York, Justin C. Morgan, J., presents the single question whether an estate is entitled to an estate tax marital deduction, § 812(e)(1)(A), Internal Revenue Code of 1939, for a portion of the proceeds of a policy of life insurance upon the life of the deceased spouse when the whole proceeds are held by the insurer under a settlement option of the policy, the terms of which provide that the surviving spouse shall receive monthly payments for the remainder of her life, but that if she should die before the expiration of twenty years then the decedent's daughter shall receive

the payments until twenty years have elapsed. The district court found that that portion of the total proceeds allocable to the funding of a contingent life annuity from and after twenty years after the decedent's death qualified for the marital deduction. It was agreed by the parties that in no event would the portion of the proceeds necessary to fund the twenty years of monthly payments certain qualify for the deduction.

We hold that no part of the proceeds so held by the insurer qualifies for the estate tax marital deduction, and accordingly we reverse the decision below.

The relevant facts are stipulated and may be briefly stated. The decedent held two life insurance policies on his own life, the total proceeds of which at his death were $30,207.10. Both policies were payable to his wife, Marion E. Meyer. The decedent elected substantially identical payment options under the policies prior to his death on September 14, 1952.[1] By the terms of the option selected

[1] The options elected respectively provided:

[1] "10. Option C: To have the whole or any designated part of the net proceeds paid in either 120, 180 or 240 stipulated monthly minimum installments of the amount stated in the Continuous Installment Table corresponding to the sex and the age of the then beneficiary on the date of payment of the first of such installments, provided that if such beneficiary shall survive to receive the number of stipulated installments selected, payments of like amount and frequency shall continue during the lifetime of the beneficiary. The table shall apply *pro rata* per $1000 of the amount to be so paid, the first installment being payable as of date of death of Insured or the date of election if subsequent. If there be two more beneficiaries the amount payable, unless otherwise directed by the designator, shall be divided into a corresponding number of equal parts and the installments to each beneficiary will be similarly determined according to age and sex by the Continuous Installment Table. Payment under this option shall be subject to satisfactory proof of the age of the beneficiary thereunder."

* * * * *

[2] "Option 3—Life Income. Equal payments for a stipulated number of years and thereafter as long as the payee shall live, the amount of such payments to be upon the age at nearest birthday of the payee at the date of maturity of the policy."

in each policy his surviving wife was assured of monthly payments for the remainder of her life; but by the terms of each it was also agreed that 240 monthly payments would be made in any event and that they would be made to designated beneficiaries in the event that although the decedent's wife was living at his death, she did not survive to receive them all. In both policies the decedent's daughter Shirley A. Meyer, was the person primarily designated to receive the guaranteed payments in the event of the death of her mother in less than twenty years. Both decedent's wife and daughter survived him.

It was further stipulated and found that upon decedent's death the insurance companies concerned separately determined as a matter of their business practice the portion of the total proceeds required to fund the twenty years of payments certain, and both determined the sum required to fund the contingent life annuity for Marion Meyer from and after twenty years. The refund sought and recovered by the executors was $2,339.72, which is the decrease in the estate tax which would result from increasing the marital deduction by $8,238.54, the total amount determined by the two insurers as required to fund the contingent life annuity. Neither insurance contract provided, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for funding the contingent life annuity. Both of the policies provide that the policy and the application therefor constitute the entire contract between the parties.

On this appeal appellees rely exclusively on the authority of *In re Reilly's Estate*, 239 F. 2d 797 (3 Cir. 1957)

where it was determined that insurance proceeds held under what are for present purposes substantially identical contracts could be divided into two "properties" as that term is used in §812(e)(1)(B)(i) and (ii). As a consequence it was held that the amount needed to fund the contingent life annuity qualified for the marital deduction because, although "terminable" within the meaning of the preamble to §812(e)(1)(B), no "interest" in that separate property passed to any person other than the surviving spouse so that the conditions of §812(e)(1)(B)(i) and (ii) for disqualification of the gift to the spouse were not fulfilled. No other court of appeals appears to have considered this question.

Since appellee concedes that the wife's interest in the portion of the total proceeds necessary to fund the payments for twenty years certain is disqualified, the sole question is whether, as the Third Circuit held, the proceeds may be separated into two separate properties. Section 812(e)(1)(A) and (B) distinguish between property and an interest in property, and the Senate Committee Report, S. Rep. 1013 (part 2), 80th Cong., 2d Sess. (1948), expressly comments upon the distinction:

> "The terms 'interest' and 'property' as used in section 812(e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent of ownership by the surviving spouse or other person, of particular property. For example, if the surviving spouse is specifically devised an estate for her life in a farm, the 'interest' passing to her is the life estate,

and the 'property' in which such interest exists is the farm. Thus, in the case of a bequest, devise, or transfer of an interest which may be satisfied out of, or with the proceeds of, any property of the decedent's general estate or of a trust, the interest so bequeathed, devised, or transferred is an interest in any and all of such property."

* * *

"As previously stated, it is necessary for the purposes of section 812(e)(1) to distinguish between an interest in property and the property in which such interest is an interest. Thus if the decedent devises Blackacre to his wife for life with remainder to X, then X has an interest in the property (Blackacre) in which the surviving spouse has an interest. If the principal value of Blackacre was a coal mine which may be expected to be exhausted during the surviving spouse's life, nevertheless both the surviving spouse and X have an interest in the property, which is Blackacre. * * * In the case of a trust or fund, the income beneficiaries and the persons who may receive any part of the corpus have an interest in the property represented by the assets of the trust or fund as of the date of the decedent's death."

Although we think these examples speak clearly to the instant case to define the insurance proceeds as a single fund in which the wife has been granted a life estate with a remainder in the daughter, it is at least arguable on the basis of this alone that, as the Third Circuit found, the proceeds may be divided and the wife's interest treated as twofold: a life estate in one property, the payments cer-

tain, and a contingent life annuity in the other. But such doubt as we might otherwise entertain on this question is resolved by another portion of the same report in which in a specific example the present situation is expressly dealt with. After dealing at length with the provisions of (B) the Report states:

> "The same principles apply in the case of insurance proceeds and annuity contracts, as illustrated by the following examples:
>
> *Example (1).* The entire proceeds of an insurance policy on the life of the decedent are payable to the surviving spouse and the value of such proceeds is included in determining the value of the gross estate. *A marital deduction is allowed* with respect to the value of the proceeds *because no person other than the surviving spouse has an interest in the proceeds. The result will be the same whether such proceeds* are payable in a lump sum; are payable in installments to the surviving spouse, her heirs, or assigns, for a term; or *are payable to the surviving spouse for her life with no refund of the undistributed proceeds or with such a refund to her estate.* * * *" (Emphasis added.)

This example makes it plain that "proceeds" is identical with "property" at least in the situation treated by it, since the spouse's "interest" is referred to as an interest in the "proceeds" and not in a portion of them; and all possible doubt on this score is resolved by the specific example of a refundable life annuity in the entire proceeds given to the wife, in which instance it is clearly stated that the wife's interest will qualify *if* the refund is to be made to her estate.

Appendix A

The next subsequent example deals with annuities, and, if that is possible, even more clearly defines the contract creating the annuity as a single property:

> "*Example (2).* The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life *and then to his spouse during her life if she survived him.* The value of the interest of decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. *A marital deduction is allowed* with respect to the value of such interest so passing to the decedent's surviving spouse *inasmuch as no other person has an interest in the contract.* If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. *If, however, upon the death of the surviving spouse the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.*" (Emphasis added.)

Thus considered both as a dedication of the entire proceeds to the creation of a refundable life annuity with the refund in someone other than the wife's estate, or considered as the dedication of the proceeds to the purchase of a refundable life annuity, the present case falls squarely within unambiguous examples given by the responsible Senate Committee.

Appendix A

Even if we assume that had the contract provided for the segregation of the separate funds they could then have been considered separate properties, it is stipulated here and the contracts reveal that no such segregation was provided for. In a similar situation we have rejected the view that what might have been accomplished at the outset, but was not, ought nevertheless to be regarded as having been done. See *Hoffenberg v. Commissioner,* 223 F. 2d 471 (2 Cir. 1955), aff'g 22 T. C. 1185 (1954).

We do not agree with the Third Circuit that the example given in the Report of a gift to the decedent's wife and daughter as tenants in common of the decedent's interest in a patent, as to which it is clearly stated that the wife's interest qualifies for the estate tax marital deduction, is in any way inconsistent with the view that the patent is a single property, or that, conversely, the example may be said to support the view that the patent, by virtue of the gift, became two separate properties. The Report expressly states that the interest given to the wife qualifies because it does not come within §812(e) (1) (B)(ii) although it is a terminable interest under (i). The reason it does not come within (ii) is we think that the daughter's possession and enjoyment of her interest in the single property take place at once, and not "after" the termination of the wife's terminable interest, and not because there were two properties created.

We are similarly unpersuaded by resort to the analogy of §812(e)(1) (G), which creates an exception from the terminable interest rule when, *inter alia,* the surviving spouse is given a power of appointment over the residue of

the proceeds. While it is true, as the Third Circuit noted, that Regulation 105, §81.47(a)(d)(2) contemplates the division of insurance proceeds into separate funds held by the insurer, it cannot be said that the Regulation contemplates that the resulting funds may be considered to be separate properties. It is perfectly consistent with the Regulation that it applies to an instance, such as that of a tenancy in common between the surviving spouse and another, in which although two interests are thus created in the single property, the wife's interest, because of §812 (e)(1)(G), is not disqualified. For example, if the surviving spouse received a life estate in one-half the proceeds with a power to appoint the remainder, and another person received one-half outright, the wife's interest would qualify if the life estate and the power met the requirements of §812(e)(1)(G), while without (G) it may be assumed that it would not.

Moreover, even if the Regulation might be said to be in some manner inconsistent with the view we have taken, we would not accord it great weight. It interprets and gives effect to a special exception to the terminable interest rule for powers of appointment over the proceeds of life insurance and annuity contracts. It would be hazardous, in the face of the convincing evidence for the contrary result, to reason in the present case from a policy concerning powers of appointment, especially because the statute in part (G) conditions the granting of the exception for powers of appointment on the fulfillment of special requirements not otherwise present. Thus, *inter alia*, payments to the surviving spouse under the option must com-

mence not later than thirteen months after the decedent's death, a limitation conspicuously lacking here.

Reversed.

WATERMAN, *Circuit Judge* (dissenting):

I cannot join with the majority in their disposition of this appeal. I would affirm the result below and would follow, as did the district court, 166 F. Supp. 629 (WDNY 1958), the lead of the Third Circuit in *In Re Reilly's Estate*, 239 F. 2d 797 (3 Cir. 1957).

It is, and was stated in one of the exhibits attached to and made part of the parties' stipulation to be, the accounting and actuarial practice of the life insurance industry to do exactly what the companies here did. Upon the death of Mr. Meyer, under the settlement options he chose, each of the two companies set aside two distinct funds—each company estimating the amounts needed in each fund by reference to Mrs. Meyer's life expectancy as set forth in the applicable Mortality Table. In each case, one of these funds, the first one, was to provide payments certain for twenty years. If Mrs. Meyer died during this twenty year period the payments certain were to be made to another beneficiary. The status of these two first funds is not involved in this appeal. It is agreed they do not qualify for the estate tax marital deduction. In each case the other fund, the second one, was set aside to finance payments payable only to Mrs. Meyer for as long as she might live after the expiration of the twenty years and after the exhaustion of the first fund. These payments were not to begin until the twenty-year period had elapsed.

Appendix A

There was no contingent beneficiary. If Mrs. Meyer died during the twenty year period the insurance companies would each pocket the full amount of this second fund. If she died after she began to draw against the fund, but before it had been exhausted, each company would pocket the unexhausted sums. On the other hand, if Mrs. Meyer lived longer than her life expectancy and thereby exhausted the second fund the insurance companies were obligated to continue to pay her out of company money the agreed payments until her death."

It seems clear that the money needed to fund the payments for twenty years certain, and that needed to fund the continuing life long payments, were necessarily required to be kept separate and constituted separate entities. They were for different purposes, purposes contemplated by Mr. Meyer when he chose the particular settlement option that he chose, and their separation was required in order that neither Mr. Meyer nor the companies be disadvantaged in the execution of the settlement plan. Therefore, of what possible materiality can it be that this segregation of funds was not spelled out in the settlement contract? Or that Mr. Meyer didn't specifically request a division?

To be sure, they were both settled for the primary purpose of providing installment payments to the surviving spouse during her lifetime. But there the similarity ceases and the dissimilarity is so marked that I think it error to consider that in each case these two funds were but one property. If the interest of the surviving spouse in the property constituting the first fund should happen to terminate or fail by her death the balances remaining in that

'und could pass without consideration to the contingent beneficiary. But the second fund was not so settled. While the interest of the surviving spouse in the property constituting the second fund might also terminate or fail by her early death those balances would pass for "an adequate and full consideration in money or money's worth" to the insurance companies with whom the settlor had bargained on the chance that his widow would outlive her life expectancy and receive excess payments.

Hence I would hold that the portions of the proceeds of Mr. Meyer's insurance policies that by contract with him were set aside to fund payments to Mrs. Meyer after the twenty-year period had elapsed qualified for the allowance of the estate tax marital deduction. I believe this result is consistent with the purpose of Section 812(e)(1)—to make the tax treatment of married persons in community property and non-community property states more nearly uniform—and surely the arrangement with which we are dealing does not provide an avenue for abuse of the marital deduction provision. Consequently, since "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy," *United States v. Boisdore's Heirs,* 8 How. 113, 122 (1849); *Mastro Plastics Corp. v. National Labor Rel. Bd.,* 350 U. S. 270, 285 (1956); *National Labor Relations Bd. v. Lion Oil Co.,* 352 U. S. 282, 288 (1957), I would affirm the court below.

I interpret the difference between my colleagues and me to turn on the fact that they are unwilling to consider as done what actually was done. They believe that, because there was no specific contract authorizing segregation, it is

improper for estate tax purposes to divide the insurance proceeds into two funds. I am sure that if they agreed with me that two funds are permissible, they also would agree that the estate of Mr. Meyer would be entitled to the benefit of the marital deduction to the extent of the funds before us on this appeal. The specific wording of the Code's applicable provisions so provide. See 1954 I. R. C. § 2056(b)(1)(A) and (B); 1939 I. R. C. § 812(e)(1)(B)(i) and (ii). *See also* Reg. 105, § 81.47a(b)(2) and (3). The benefits of the marital deduction are deniable to a terminable interest only where a remainder interest in the entire property passes to some person other than the surviving spouse for less than adequate consideration, and this other person may thereupon possess or enjoy the remainder interest after the termination of the wife's present interest. I think we would all agree that unless there are additional rights created in a property entity for the benefit of third parties the interests passing to the surviving wife in that property entity are entitled to and should be accorded the benefit of the marital deduction.

APPENDIX B

Internal Revenue Code of 1939:

SEC. 812 NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(e) [as added by Sec. 361 (a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*

(1) *Allowance of marital deduction.*

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such person); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(26 U. S. C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

Sec. 81.47a [As added by T. D. 5699, 1949-1 Cum. Bul. 181]. *Bequests, Etc., to Surviving Spouse.*—(a) *Allowance of marital deduction.*—In the case of the estate of a citizen or resident of the United States dying after December 31, 1947, there may be deducted the value of any property interest (except as otherwise provided in section 81.47b) which passed from the decedent to his surviving spouse. Such deduction is hereinafter referred to as the "marital deduction." * * *

In order to obtain the marital deduction with respect to any property interest the executor must establish the following facts:

(1) That the decedent was survived by his spouse;

(2) That such property interest passed from the decedent to such spouse (see paragraphs (b) to (g), inclusive, of this section);

(3) That such property interest is a "deductible interest" (See section 81.47b);

(4) The value of such property interest (see Section 81.47c); and

(5) The value of the "adjusted gross estate" (see Section 81.47d).

* * * * *

(d) *Proceeds held by the insurer under a life insurance, endowment, or annuity contract, with power of appointment in surviving spouse.*— * * *

* * * * *

If the interest of the surviving spouse under a life insurance, endowment, or annuity contract is in proceeds held by the insurer which do not, however, represent the entire amount payable under such contract, the provisions of section 812(e)(1)(g) nevertheless apply to such proceeds so held to which all five of the above conditions apply. For example, an insurance contract on the decedent's life may provide for payment of the proceeds into two funds to be held by the insurer. In such case, if all five of the above conditions are satisfied with respect to all amounts payable into one such fund, then the special rule of section 812(e)(1)(g) is applicable to the proceeds held in such fund.

* * * * *

Sec. 81.47b [as added by T. D. 5699, *supra*]. *Nondeductible interests.*—(a) *General.*—The property interests which passed from the decedent to his surviving spouse (as set forth in Section 81.47a) fall within two general categories: (1) Those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deduct-

ible interests'' and ''nondeductible interests,'' respectively. As to the several classes of ''nondeductible interests'' see paragraphs (b) to (f), inclusive, of this section. Subject to the limitation set forth in Section 81.47d, the marital deduction is equal in amount to the aggregate value of the ''deductible interesst,'' that is, the property interests which passed from the decedent to his surviving spouse and do not fall within any of the classes described in such paragraphs (b) to (f).

* * * * *

(d) *Interest in property which another person may possess or enjoy.*—Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as ''terminable interests'') which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and.

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some

other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "nondeductible interest." As to the meaning of the term "passed from the decedent to a person other than his surviving spouse," see paragraph (b) of Section 81.47a.

In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property," as such term is used in Section 812(e), and an "interest in property". The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property".

* * * * *

The term "person other than his surviving spouse" includes the possible unascertain takers of a property interest, as, for example, the members of a class to be ascertained in the future * * *. Whether there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following

termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.

In the following examples, it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse was not for an adequate and full consideration in money or money's worth:

* * * * *

(iv) H during his lifetime purchased an annuity contract providing for payments to himself for life and then to W for life if she should survive him. Upon the death of the survivor of H and W, the excess, if any, of the cost of the contract over the annuity payments theretofore made was to be refunded to A. The interest which passed from H to W is a "nondeductible interest" since A may possess or enjoy a part of the property following the termination of the interest of W. If, however, the contract provided for no refund upon the death of the survivor of H and W, or provided, that any refund was to go to the estate of the survivor, then the interest which passed from H to W is (to the extent it is included in H's gross estate) a "deductible interest".

(v) H devised property to W and A as joint tenants with right of survivorship. The interest which passed from H to W is a "nondeductible interest" since, if the tenancy is not severed and A

survives W the interest of W will terminate and A will continue to possess or enjoy the property.

* * * * *

(viii) H bequeathed a patent to W and A as tenants in common. In this case, the interest of W will terminate upon the expiration of the term of the patent, but possession or enjoyment of the property by A must necessarily cease at the same time. Therefore, since A's possession or enjoyment cannot outlast the termination of W's interest, the latter is a "deductible interest."

* * * * *